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Alabama Catfish, Inc. d/b/a Harvest Select Farms, LLC and Pamela Witherspoon. Case 10–CA–34246

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND WALSH

On June 11, 2003, Administrative Law Judge Lawrence W. Cullen issued the attached bench decision in this case. The Respondent has filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision.

I. INTRODUCTION

The judge found that the Respondent violated Section 8(a)(3) and (1) and Section 8(a)(4) and (1) by refusing to rehire applicant Pamela Witherspoon on January 29, 2003, because she was a discriminatee and a witness in an unrelated Board case, *Southern Pride Catfish*, 331 NLRB 618 (2000), which led to the Respondent being subpoenaed to appear at a compliance hearing in that case.¹ The judge credited the General Counsel's witnesses that the Respondent's general manager, Robert Lee, told Witherspoon on January 29 that he could not rehire her because of what had happened in the *Southern Pride* case and the subpoena.

We find that the judge's bench decision does not adequately set forth his reasons for crediting certain witnesses over others. Of particular concern, the judge's decision does not indicate whether he considered certain undisputed facts that arguably are inconsistent with his credibility determinations. As a result, we are unable to resolve the Respondent's exceptions to the judge's finding that it unlawfully refused to rehire Witherspoon. Accordingly, we shall remand the case to the judge so that he may reconsider his credibility determinations and issue a supplemental decision fully explaining the basis for crediting or discrediting the testimony of the respective witnesses.

II. THE FACTS

Briefly, the Respondent operates a catfish processing facility in Uniontown, Alabama. Pamela Witherspoon worked for the Respondent at various times, but the present case begins with her prior discharge from Southern Pride Catfish (Southern Pride), a local competitor. In 1995, Southern Pride discharged Witherspoon and nine other employees, including Witherspoon's sister-in-law, Bridgette, allegedly because they attempted to unionize. See *Southern Pride Catfish*, supra.

In March 1996, the Board issued an unfair labor practice complaint alleging that the discharges violated the Act. The Board ultimately found the discharges unlawful and ordered the appropriate make-whole relief.

Meanwhile, in April 1996, General Manager Robert Lee hired Pamela and Bridgette Witherspoon. Lee was unsure if he knew of the *Southern Pride* case at the time, but he learned of it no later than 1998. Over the next several years, General Manager Lee hired four other employees (Doria Lee, Barbara Lewis, Debbie Lewis, and Regina Lewis) who, like Pamela Witherspoon, were discriminatees and witnesses in the *Southern Pride* case. These four employees ultimately left the Respondent's employ for reasons not disclosed by the record.

In April 1997, General Manager Lee discharged Pamela Witherspoon for excessive absenteeism. Witherspoon immediately began asking Lee for her job back, but he refused because of her poor attendance. Lee, however, eventually rehired Witherspoon in June 1997. It was not uncommon for Lee to give former employees a second chance in such circumstances because the Respondent experienced very high turnover rates and Uniontown offered a small labor pool.

Pamela Witherspoon, however, continued to have problems with absenteeism and tardiness. She received several warnings and 1-day suspensions in 2001. She was suspended for 5 days, from January 29 to February 4, 2002, for not showing up at all. She then missed additional days of work in February 2002. As a result, on February 12, 2002, General Manager Lee discharged Pamela Witherspoon for missing work. Once again, Witherspoon immediately began trying to get her job back, but Lee consistently refused because she had "messed up" twice.

In November 2002, the Board issued a compliance specification in the *Southern Pride* litigation, setting a compliance hearing for January 23, 2003. By this time, Witherspoon had contacted General Manager Lee five or six times about returning to work for the Respondent. There is no dispute that Lee refused each time because of her poor attendance.

¹ All dates are 2003, unless stated otherwise.

On January 2, 2003, Pamela Witherspoon, and her mother, Mary Davis, reapplied to the Respondent.² The same day, Witherspoon saw General Manager Lee and again asked Lee to rehire her. Lee refused. Witherspoon testified that Lee showed her a subpoena requiring his appearance at the *Southern Pride* compliance hearing and cited the subpoena and “what had happened at Southern Pride” as the reasons he could not rehire Witherspoon. According to Witherspoon, Lee also said that Bridgette Witherspoon’s job might be in jeopardy. Lee denied all of this, testifying that he told Witherspoon only what he had been telling her for the past year: that he could not rehire her because of her poor attendance record.

As it turns out, Witherspoon’s testimony had to be wrong about General Manager Lee showing her the subpoena on January 2, because the subpoena itself shows that it was not served on Lee until January 9, and the judge so found. In any case, on January 22, the Southern Pride litigation settled and the January 23 compliance hearing was cancelled. There is no evidence as to when the Respondent, or more specifically General Manager Lee, learned of the settlement.

There is no dispute, however, that on January 29 the Respondent contacted Pamela Witherspoon and Mary Davis to come to the Uniontown facility. Witherspoon and Davis met with General Manager Lee in his office later the same day. According to Pamela Witherspoon, Lee said that he could hire Mary Davis but not Witherspoon “because of the union, what had happened with the union . . . a man told him they couldn’t hire me back.” Mary Davis substantially corroborated Witherspoon’s testimony. Davis testified that Lee said, “I can hire you [Mary] back . . . they’ll let me hire you back . . . but I can’t hire you [Witherspoon] because of some concern and situation at Southern Pride.” Davis further testified that Witherspoon asked, “what does Southern Pride have to do with Harvest Select?” and that Lee responded, “I don’t know, it come from the front, up front, like that.” Davis started working the next day. Lee acknowledged that the subpoena came up because Witherspoon saw it sitting on his desk, but he insisted that the only reason he gave Witherspoon for not rehiring her was her poor attendance. The judge credited Witherspoon and Davis.³

² Mary Davis had previously worked for the Respondent but had been laid off, in part because of her own poor attendance. The record does not reveal what, if any, efforts Davis previously had made to get her job back.

³ The judge found Mary Davis to be particularly credible because she clearly was reluctant to testify against the Respondent, even though the case involved her own daughter. Indeed, Davis testified she feared losing her job.

On April 1, General Manager Lee rehired Pamela Witherspoon for a third time, notwithstanding her poor attendance record. Also, shortly before the hearing in this case, Lee made Bridgette Witherspoon his personal secretary.

III. THE JUDGE’S DECISION

The judge found that the Respondent violated the Act by refusing to rehire Pamela Witherspoon on January 29. As indicated, the judge’s finding was based principally on his credibility determinations. He believed Witherspoon that General Manager Lee cited the *Southern Pride* litigation as the reason he could not rehire her. He also credited Mary Davis’ corroborative testimony that, on January 29, Lee cited both the subpoena and *Southern Pride* as the reason he could not hire Witherspoon back. Thus, the judge found that the General Counsel established that Witherspoon’s protected activity was a motivating factor in the Respondent’s decision not to rehire her. He concluded:

I find that the disaffection of the company with the situation of seeing her as somebody who had been fired in the past, and who was now involved in the Southern Pride case and the subpoena matter where the company was going to be called upon to present evidence and bring its records, is something that the company had determined it did not want to deal with.

Further, the judge found that the Respondent failed to establish, as an affirmative defense, that it would have refused to rehire Witherspoon in the absence of her protected union activity. Finally, the judge rejected the Respondent’s contention that the absence of any adverse action against Bridgette Witherspoon established that it did not act unlawfully with respect to Pamela Witherspoon.

IV. DISCUSSION

As indicated, we have decided to remand the case to the judge because the judge’s decision does not disclose whether he considered certain facts that appear to be inconsistent with his credibility determinations. As the Respondent argues, the judge did not discuss the fact that, when General Manager Lee supposedly told Witherspoon on January 2 that he could not rehire her because of what happened at Southern Pride, there is no evidence that Lee, or the Respondent, knew of the forthcoming subpoena or compliance hearing regarding Southern Pride. It appears that Lee knew only that Witherspoon was involved in a case against Southern Pride, a fact he had known since at least 1998, and perhaps earlier, and had never cited as a reason for not rehiring Witherspoon. Although the judge found it “likely” that Lee suddenly mentioned the *Southern Pride* litigation

tion as the reason he could not rehire Witherspoon, he never explained why. Nor did he explain why he doubted Lee's testimony that he told Witherspoon that he could not rehire her because of her poor attendance, as he had been telling her for the past year.⁴

Similarly, the judge did not explicitly consider the potential impact of the January 22 settlement of the *Southern Pride* litigation. The settlement ended the *Southern Pride* litigation without the need for General Manager Lee to appear at the compliance hearing on January 23. Citing this fact, the Respondent argues that the burden of appearing at the hearing could no longer have been a factor in Lee's decision not to rehire Witherspoon on January 29. Thus, the Respondent contends that the judge's decision (to credit Witherspoon and Mary Davis' claim that, on January 29, Lee cited the subpoena and the *Southern Pride* litigation as a reason for not rehiring Witherspoon) makes no sense. Without expressing a view on the significance of the settlement, we agree that the judge should address the possible relevance of the settlement in determining the credibility of Witherspoon, Davis and Lee.

Further, the judge should address the Respondent's defense that, at the time of its refusal to rehire Witherspoon in January 2003, it had never rehired a former employee who, like Witherspoon, had been discharged on two prior occasions for excessive absenteeism. The judge may have overlooked Lee's testimony that certain individuals who had been twice discharged for absenteeism were rejected for rehire for that reason. The judge should address this testimony in reconsidering his decision on remand.

Lastly, we agree with the Respondent that the judge did not adequately distinguish its nonaction against Bridgette Witherspoon. The judge neither credited nor discredited Pamela Witherspoon's testimony that, on January 2, General Manager Lee threatened that Bridgette's job might be in jeopardy as well. Nor did the judge explain why the Respondent's nonaction against Bridgette was insufficient to dissuade him from crediting the testimony of Pamela Witherspoon and Mary Davis that Lee cited the *Southern Pride* litigation as a reason for the adverse action taken against Pamela Witherspoon.

⁴ The Respondent asserts that, once the judge discredited Witherspoon's claim that Lee showed her a subpoena on January 2, the judge had no evidentiary basis for concluding that General Manager Lee "likely" mentioned the *Southern Pride* litigation. In fact, there was a possible basis for the judge's finding. Witherspoon testified that, on January 2, Lee showed her the subpoena and then told her "That they won't give me my job back because of what happened at Southern Pride." The question, though, is why the judge credited this testimony over Lee's denial.

ORDER

It is ordered that the issue of whether the Respondent violated Section 8(a)(1), (3), and (4) is remanded to the judge for further consideration. In reviewing the record on remand, the judge shall fully analyze the evidence and witness testimony set forth above. He shall then prepare a supplemental decision setting forth credibility resolutions that fully explain the basis for crediting or discrediting witnesses, findings of fact, conclusions of law, and a recommended Order. Following service of the Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C., September 30, 2003

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

Katherine Chahrouri, Esq., for the General Counsel.
Jay St. Clair, Esq., for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Uniontown, Alabama, on May 9, 2003, and I delivered a bench decision on that date.

I found Respondent Alabama Catfish, Inc., d/b/a Harvest Select Farm, LLC violated Section 8(a) (1), (3), and (4) of the National Labor Relations Act (the Act) by its unlawful failure and refusal to rehire employee Pamela Witherspoon because of her engagement in protected concerted activities in violation of Section 8(a)(3) and (1) of the Act and because of her resort to the National Labor Relations Board (the Board) process in violation of Section 8(a)(4) of the Act.

My bench decision as corrected and amended with the issuance of this decision in final form was delivered in accordance with the authority of Section 102.35 (a)(1) thereof. I certify the accuracy of, and attach hereto as "Appendix A" of my bench decision, the pertinent part of the trial transcript as corrected and amended, pages 110 to 125.

CONCLUSION OF LAW

Based upon the entire record at the hearing, I found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent violated Section 8(a)(3) and (1) of the Act because of the dis-

crimination against Pamela Witherspoon by refusing to rehire her because of her participation in protected concerted activities and violated Section 8(4) and (1) of the Act by its refusal to rehire her because of her resort to Board process. These violations have affected and unless permanently enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I recommend Respondent be ordered to cease and desist from the foregoing violations of the Act and to make Pamela Witherspoon whole for any loss of pay or benefits she may have sustained from the date of January 29, 2003, when Respondent failed and refused to rehire her for the unlawful reasons stated above, until April 1, 2003, when it did rehire her. I find it is unnecessary to recommend that Witherspoon be reinstated to the position for which she was applying as Respondent rehired her as of April 1, 2003. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent Alabama Catfish, Inc. d/b/a Harvest Select Farm, Uniontown, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire employees because of their engagement in protected concerted activities under the Act or because of their resort to Board process.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, make Pamela Witherspoon whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against her in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure and refusal to hire her and within 3 days notify her in writing that this has been done and that this unlawful action will not be used against her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director of Region 10, may allow for good cause shown, provide at a reasonable place designated by the board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and

all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Uniontown, Alabama, location copies of the attached notice marked "Appendix B."² Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. June 11, 2003

APPENDIX A

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complaint.

THE COURT: All right. I'm going to, as I have advised you previously, enter a bench decision in this case, and we'll take a brief recess while I get that together, and I would like to talk to the attorneys on both sides first.

(Off the record and reconvened.)

THE COURT: On the record.

Ladies and gentlemen, I'm going to issue a bench decision in this case, as I've indicated previously, and that's in the case of Alabama Catfish, Inc., d/b/a Harvest Select Farm and Pamela Witherspoon, an individual, Case No. 10-CA-34246-001-0.

Initially, this case involved allegations of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act, with respect to alleged discrimination against Pamela Witherspoon, an individual.

It's been alleged in the complaint and is admitted, and I find that at all times material herein, Respondent, an Alabama corporation, with an office and place of business in Uniontown, Alabama, herein called its facility has been engaged in the business of catfish farming, processing, distribution and sales.

Further, that during the past year, which period is representative of all times material herein, Respondent has at its Uniontown, Alabama facility, received in excess of \$50,000

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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—in income derived from the sale of goods and interstate commerce to points outside the State of Alabama, and that at all material times herein, Respondent has been an employer engaged in commerce within the meaning of Section 2 (2)(6) and 7 of the Act.

It is further alleged and admitted, and I find that at all material times the United Steelworkers of America, AFL–CIO–CLC has been a labor organization within the meaning of Section 2(5) of the Act.

Further, it is alleged and admitted that at all material times, the following individuals held the positions set forth opposite their names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act; Jerry Worthington, President; Robert Lee, Plant Manager; Linda Lewis; supervisor.

It is alleged in the complaint that from January 30th, 2003 until March 31, 2003, the Respondent failed and refused to rehire the charging party, Pamela Witherspoon and that the Respondent engaged in this conduct because of the involvement of Charging Party as a named discriminatee in an NLRB compliance proceeding in the case of Southern Pride Catfish, 10–CA–28960, and further, engaged in the conduct described above, because the named employee assisted the union and engaged in concerted protected activities, and to discourage other employees from engaging in these activities.

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It is alleged that by this conduct, the Respondent—restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, by discriminating in regard to the hire and tenure and the terms and conditions of employment of its employees; thereby discouraging membership in a labor organization in violation of Sections 8(a)(1) and (3) of the Act, and has discriminated and is discriminating against employees for filing charges and/or giving testimony under the Act, and that Respondent has been therefore engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act

The parties have entered into a joint stipulation of facts, and under this joint stipulation, the correct name of the Respondent has been amended to show that it is Alabama Catfish, Inc., d/b/a Harvest Select Farm. It is stipulated also that on March 22nd, 1996, the Regional Director for Region 10 of the NLRB issued a complaint in Case 10–CA–28960 alleging that Southern Pride Catfish had committed a number of unfair labor practices, including the wrongful discharge of ten employees, Rosie Aaron, Shirley Aaron, Carie Hamilton, Doria Lee, Barbara Lewis, Debbie Lewis, Regina Lewis, Bridget May Witherspoon, Brenda Scott, and Pamela Davis Witherspoon.

It is further stipulated that Southern Pride Catfish and Respondent are unrelated corporate entities.

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On March 10, 1996, the Administrative Law Judge at the NLRB found in the Southern Pride case, that Southern Pride Catfish had committed multiple unfair labor practices, including the discharges of the ten employees named above. The

NLRB adopted the ALJ's decision on June 30, 2000 at 331 NLRB No. 81. On November 21, 2002, Region 10 of the NLRB issued a compliance specification in Southern Pride Catfish, 10–CA–28960, setting a compliance hearing for January 23, 2003, in Uniontown, Alabama. The parties in that case reached a settlement on January 22, 2003, and backpay checks were distributed to the named discriminatees including Pamela Witherspoon on February 10, 2003.

In the instant case, Respondent hired Pamela Witherspoon on April 25, 1996. Respondent discharged her on April 23, 1997 for excessive absenteeism. Respondent rehired Witherspoon on June 16, 1997, and terminated her for a second time on February 12, 2002 for excessive absenteeism. She was unemployed from the time of her discharge on February 12th, 2002 until Respondent rehired her for a third time on April 1, 2003.

Further, the following discriminatees from the Southern Pride case were hired by Respondent on the dates indicated. Doria Lee, August 18, 1997; Barbara Lewis, December 1, 1997; Debbie Lewis, April 22, 1998; Regina Lewis, February 2, 1999; Bridget

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Witherspoon, April 25, 1996. Of the persons mentioned—in this paragraph, only Bridget Witherspoon remains employed by Respondent through the present date. Respondent was hiring employees to work at its catfish processing facility in Uniontown, Alabama during the period November 2002 through March 2003. During that period of time, approximately 80 people were hired.

General Counsel's Exhibit 3 is a true and correct copy of a subpoena in Southern Pride Catfish, 10–CA–28960, which was served on Robert Lee on January 9, 2003.

General Counsel's Exhibit 4 is a true and correct copy of a subpoena in Southern Pride Catfish, which was served on Robert Lee on January 17th. These subpoenas were for a hearing set for January 23rd, 2003.

The General Counsel called Pamela Witherspoon, the alleged discriminatee in this case. She was rehired and is currently employed by Respondent since April 1 of the year 2003.

Pamela Witherspoon, applied on January 2, 2003 for re-employment. At the time, she was with her mother Mary Ann Davis, who also applied. They went together, and spoke to a lady in the front office, and to Robert Lee, who is the plant manager, and Pamela Witherspoon testified

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that Lee said she could not get her job back because there was a subpoena to go to court. This involved the Southern Pride Catfish case. On that date, which was January 2, 2003, she filed an application. She testified that Robert Lee told her he could not give her her job back because of the Southern Pride case. That is the case in which she was listed as a discriminatee.

She returned on January 29th, a second time, because a representative of the company had called her grandmother, and

left a message with her grandmother for her and her mother, Mary Ann Davis to come to the plant. They did so on that date, and waited in the breakroom, and met with Robert Lee, who told Mary Ann Davis and Pamela Witherspoon to go to the

office, and told Mary Ann Davis that he could hire her back,—notwithstanding her prior unsatisfactory attendance. Mary Ann Davis actually had been let go during a lay off, although she acknowledged on the stand, that she was told at that time, that her attendance was a factor in the decision to lay her off. Mary Ann Davis started working the next day on January 30th.

During this conversation on January 29th Lee

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did not mention any prior attendance problem of Witherspoon and gave no other reason, for not hiring her other than her involvement in the Southern Pride Catfish case.

She had gone to Robert Lee several times in the year 2002 to obtain her job back, and he had told her that he would help to get her job back.

On January 2, 2003 when both ladies had applied, a not hiring sign, which is normally posted on the door of the facility was not up, indicating that there was hiring going on at that time, and the Respondent has stipulated it was in fact hiring during that time period.

At the initial meeting on January 2nd, Lee told Witherspoon that the subpoena was the reason Respondent would not hire her back. I find that particular testimony is not credible, because the subpoena itself was dated on the 9th, which would be after the date of the January 2nd meeting.

I do find, however, that it is likely that there was an indication from Lee that he could not hire her because of this particular case, as the legal proceedings in this case were well known throughout this small community in Uniontown. Witherspoon testified that two weeks before the second conversation, Lee had told her that she would not be hired because of her union and her lawsuit.

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In the first instance, only the subpoena was mentioned, according to her testimony. Here again, I do not credit this specific reference to the subpoena. In the second meeting, that's on the 29th, both the lawsuit and the union were mentioned.

Corine Davis, the grandmother of Pamela Witherspoon testified that she received a call in January 2003, asking for Pamela Witherspoon and her mother, Mary Ann Davis, to come in to the company to apply for work. Shortly thereafter, Pamela Witherspoon returned and told Ms. Davis that Mary Ann Davis had been hired, but that they would not hire Pamela Witherspoon back.

The mother of Pamela Witherspoon, Mary Ann Davis testified. She is now currently employed with the Respondent, and was a reluctant witness, and expressed some fear as to her job security, if she testified in this case. She testified that she had been laid off during a lay off, that she had been late, and was told that that had something to do with her lay off. In January 2003, she put in her application, and she was with Pamela at the time they gave the applications to the lady at the desk, at the employer's facility. The lady asked why she had been fired or laid off, and she told her because of her attendance. She asked Pamela the same question, and she also said it was because of her attendance, and the lady took the information.

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Davis testified that when they later received the call to return to the plant, they talked to a lady named Geneva, and then went in the breakroom to talk to Robert Lee, and then he came in and told her, Mary Ann Davis, that he could hire her back, but he could not hire Pamela back because of something at Southern Pride.

Davis started the next day on January 30th. Davis testified further that in late February 2003, Linda Lewis, her supervisor told her that she did not think it was fair that Pamela had not been hired because of the Southern Pride case.

Linda Lewis was called by the Respondent, and she denied that she had had a conversation with Davis as to why Pamela Witherspoon had not been rehired by the company, and denied that she had made any mention of or had any discussion with respect to Southern Pride. She testified further, that she had never been told not to hire Pamela Witherspoon.

Robert Lee, who is the general manager of the plant, testified that there are normally about 150 to 175 employees at the plant. He testified that there is about a 25 percent plus or minus turnover from time to time. The records in this case indicate that 80 employees of approximately 150 were rehired between November of 2002 and early 2003, which would indicate an approximate 50 percent turnover during that period of time.

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Lee testified that several times Pamela Witherspoon tried to get her job back since she'd been terminated, and he told her he could not hire her back because of her attendance problems. He acknowledged the conversations with Pamela Witherspoon in January 2003, and testified that during the first conversation, Pamela asked for her job back and he said no because of her absentee and tardiness problems, and that she left.

On the second occasion, he had the subpoena on his desk, and this would have been on the 29th of January, and Pamela came in the breakroom and she asked for her job back, and she came in the office, and he told her that he had tried her out two times, and she had been deficient with respect to her attendance problems.

The subpoena was on his desk, and he testified that she said, I see you have a copy of the Southern Pride thing, and he acknowledged that he had. And she asked again for her job back, and he told her that he is the only one that she can talk to, and that she is not getting her job back.

He testified further that on a third occasion in January, he received a telephone call from Pamela Witherspoon, and the same conversation took place. She asked for her job back, and he told her no once again, and that was the end of the conversation.

He also testified that on the second occasion, Witherspoon had told him she was going to get some money from

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the Southern Pride Catfish case, but that she still wanted her job back.

He acknowledged on the stand that he has on a number of occasions fired employees for attendance problems and then later brought them back. From time to time there has been a

relationship with Southern Pride to the extent that when the company does not have a sufficient amount of catfish to process, they have purchased catfish from Southern Pride as well as from other catfish processors.

He acknowledged further, that as a result of the subpoena, he was going to be required to go to court and testify, and bring a number of documents, and this would involve missing work. He contended that Pamela Witherspoon had failed on two occasions to properly perform her duties and show up to work on time, and this was the reason he decided not to rehire her.

Analysis. There are two alleged violations of the Act, and that is an alleged 8(a)(1) and (3), with respect to discrimination because of union or concerted activities, and 8(a)(1) and (4) with respect to the interference of Board process.

With respect to the 8(a)(1) and (3), I find that the General Counsel has established a prima facie case of a violation of the Act, by Respondent's

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refusal to rehire Pamela Witherspoon.

Under *Wrightline, a Division of Wrightline, Inc.*, 251 NLRB 1083, (1980) and 662 F2d 899, (1st Cir. 1981) cert denied 455 U.S. 989 (1982), the General Counsel has the initial burden one, to establish that the employees engaged in protected concerted activities; two, that the Respondent had knowledge of or at least suspicion of the employee's protected activities; three, the employer took adverse action against the employee; four, a nexus or link between the protected concerted activities and the adverse action underlying motive.

Once these four elements have been established, the burden shifts to the Respondent, to prove by a preponderance of the evidence that it took the adverse action for a legitimate non-discriminatory business reason.

In *FES 331 NLRB 9* (2002), enfd, 301 F3d 83 (3rd Cir. 2002), the Board considered a discriminatory refusal to hire, whereas in the instant case, this was a refusal to rehire, but the same analysis applies in this case.

And that is, in accord with the allocation of burdens in *Wrightline*, that the Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct, that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered

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uniformly to such requirements, or that the requirements themselves were pretextual or were applied as a pretext for discrimination, and three, that anti-union animus contributed to the decision not to hire the applicants. Once this is established the burden will shift to the respondent to show that it would not have hired the applicants, even in the absence of their union activity or affiliations. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show at the hearing on the merits, that they did not possess the specific qualifications the position required. In the instant case, I find that the alleged deficiency, of Witherspoon, was not the reason, she was not rehired.

I find that under *Wrightline* the Respondent has failed to meet its burden of showing that it would not have hired her in the absence of her concerted activities.

Further, with respect to the 8(a)(4) allegation, in *General Services*, 229 NLRB 940, 1977, the Board held that the purpose of Section 8(a)(4) is to ensure effective administration of the Act, by providing immunity to individuals who initiate unfair labor practice charges, or assist the Board in proceedings under the Act. In 1972, the Supreme Court issued its decision in *NLRB*

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v. Robert Scrivinger d/b/a AA Electric Company, 405 US 117, and stated that Section 8(a)(4) applied not only to filing charges and testifying at a formal hearing, but also included affidavits given during an investigation, and also as in this case, appearing or being called to testify but not testifying at a Board hearing, and being subpoenaed.

In the instant case, I find that although the Respondent had a number of reasons, with respect to the attendance problems for not rehiring Witherspoon, and although it had rehired her in the past, and had other employees who had been rehired, although they may have been involved in the Southern Catfish case, that they had not taken any action upon, in the instant case, it did take a look at her particular attendance problems, and she was called in for an interview after she had applied on January 2nd, indicating that there was an interest in re-employing her. Now, whether or not that was a perfunctory matter remains perhaps at issue in this case, and I make no determination on that.

However, I do credit her and I find particularly compelling the testimony of Mary Ann Davis, who has a pecuniary interest as a current employee, and who displayed a reluctance to testify in this case, notwithstanding that it was her daughter whose win or loss situation in the case was at issue. I believe that Davis was a truthful witness. I believe that with

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respect to Witherspoon, although there was some confusion on dates, that she did hear the comments from Mr. Lee, and this may have resulted from a reluctance on the part of the company to once again get involved with someone who had been involved in this Southern Pride Catfish case, and who probably by all accounts was a marginal candidate for re-employment, but I find that the 8(a)(3) and 8(a)(4) discriminatory motives were what tipped the scales in determining that she not be rehired. I find that the disaffection of the company with the situation of seeing her as somebody who had been fired in the past, and who was now involved in the Southern Pride Case and the subpoena matter where the company was going to be called upon to present evidence and bring its records, is something that the company had determined it did not want to deal with.

As Respondent contends, no action was taken against current employee, Bridget Witherspoon, who had been listed on that list also. In this case, involving Ms. Pamela Witherspoon, although there was a situation where the Respondent had a reason, a legitimate reason for not re-employing her, I do not believe that this is the reason she was not re-employed. I believe it had to do with the Southern Pride Catfish case, and that had

to do with the 8(a)(3) aspect, her being listed as a union participant, having been discriminated against because of her

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union activities, and with regard to the Section 8(a)(4) allegation because she had resort to Board process by being called as a witness, with the possibility of testimony, although she ultimately was not called upon to testify, because that case was settled.

So therefore, under all of those circumstances, I find that the company did violate Section 8(a)(1), (3) and (4) of the Act, and I will issue a recommended remedy and the appropriate order upon return to my office, and upon receipt of the transcript in this case, which is normally ten days, I will certify that portion of the transcript, on which I have dictated this decision, with some possible modifications or changes or any corrections or additional case citations but you can be assured that this will be the decision that I will issue, with minor modifications or correction.

Is there anything further before I close the hearing in this case?

MS. CHAHROURI: No, Your Honor.

MR. ST. CLAIR: Nothing from the Respondent.

THE COURT: The hearing is now closed.

(Whereupon, the proceedings were concluded at 2:00 p.m., May 9, 2003.)

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CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board, Region 10,

Case Name: Harvest Select Farm, LLC

Case No.: 10-CA-34246

Location: Uniontown, Alabama

Date Held: May 9, 2003,

and was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for complete-

ness and no exhibits received in evidence or in the rejected exhibit files are missing.

DATE

CONTRACTOR

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

The National Labor Relations Board

The National Labor Relations Board has found that we violated the Federal labor law. And has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to rehire you or otherwise discriminate against you because of your engagement in protected concerted activities under the Act or because of your resort to the National Labor Relations Act.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, make Pamela Witherspoon whole for any loss of wages and benefits she may have sustained as a result of the unlawful discrimination, with interest.

WE WILL, remove from our files all references to the unlawful discrimination against Pamela Witherspoon and will inform her in writing that we have done so and that WE WILL NOT use the unlawful refusal to rehire her against her in any way.

ALABAMA CATFISH, INC., D/B/A HARVEST SELECT FARMS, LLC